

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

**WILLIAM B. HERMAN v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Rutherford County  
No. 52615 Don R. Ash, Judge**

---

**No. M2008-00517-CCA-R3-PC - Filed July 30, 2008**

---

This matter is before the Court upon the State's motion to affirm the judgment of the post-conviction court by memorandum opinion pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The Petitioner appeals the post-conviction court's dismissal of his motion to re-open his petition for post-conviction relief. Upon a review of the record in this case, we are persuaded that the post-conviction court did not abuse its discretion and that this case meets the criteria for affirmance pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted and the judgment of the post-conviction court is affirmed.

**Appeal by Permission Pursuant to Tennessee Code Annotated Section 40-30-117(c);  
Judgment of the Circuit Court Affirmed  
Pursuant to Rule 20 of the Court of Criminal Appeals**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

William B. Herman, Clifton, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; for the Appellee, State of Tennessee.

**MEMORANDUM OPINION**

Petitioner is currently incarcerated serving twenty years at 100% after being found guilty, on June 18, 2003, of one count of attempted second-degree murder, one count of especially aggravated kidnapping, and three counts of reckless aggravated assault. On January 25, 2005, Petitioner filed a "Notice of Direct Appeal," which the post-conviction court treated as a Petition for Post-Conviction Relief. The post-conviction court dismissed the petition because the one-year statute of limitations had expired, barring relief. *See* T.C.A. § 40-30-102(a) (2006). This court affirmed the judgment of

the post-conviction court. *See William Herman v. State*, No. M2005-00405-CCA-R3-CO, 2006 WL 929270, at \*2 (Tenn. Crim. App., at Nashville, Apr. 11, 2006), *no Tenn. R. App. P. 11 application filed*. Petitioner then filed a Motion to Re-Open Post-Conviction, asserting illegal sentencing, trial court errors, denial of his right to allocution, and ineffective assistance of counsel.

The trial court analyzed Petitioner's motion to re-open under Tennessee Code Annotated section 40-30-117. That section states:

**(a)** A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

**(1)** The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or

**(2)** The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

**(3)** The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

**(4)** It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

The statute requires that such motions be based only upon analysis of the four enumerated factors. *See* T.C.A. § 40-30-117(b) (2006). We may grant permission to appeal the denial of a motion to re-open a post-conviction petition only if the post-conviction court abused its discretion. *See* T.C.A. § 40-30-117(c).

Petitioner maintains on appeal that the trial court erred in finding that he is not entitled to retroactive application of the sentencing rule outlined in the Tennessee Supreme Court's decision in *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (herein "*Gomez II*") and that his sentence violates the Sixth Amendment to the United States Constitution.

Petitioner contends that his effective twenty-year sentence should be mitigated by retroactive application of *Gomez*. We cannot agree. The rule in *Gomez II* and *Blakely v. Washington*, 542 U.S. 196 (2004), is not a new rule but a clarification of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Gomez v. State*, 163 S.W.3d 632, 648-51 (Tenn. 2005). Because the right was recognized at the time of trial, the post-conviction court did not abuse its discretion in finding the Defendant did not prove grounds for relief under Tennessee Code Annotated section 40-30-117(a).

Similarly, Petitioner's Sixth Amendment Due Process Claims do not meet the criteria for relief outlined in Tennessee Code Annotated section 40-30-117(a).

Because we find that the post-conviction court did not abuse its discretion in concluding that Petitioner's case did not meet the statutory requirements, the State's motion is granted. The judgment of the post-conviction court is affirmed in accordance with Rule 20 of the Court of Criminal Appeals.

---

ROBERT W. WEDEMEYER, JUDGE